

89-18 43

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

THE STATE OF MICHIGAN

Petitioner,

-VS-

ALBERT LEE, III

Respondent.

ORIGINAL

RESPONDENTS BRIEF IN OPPOSITION

STATE APPELLATE DEFENDER OFFICE

BY: CHARI K. GROVE (P25812)
Assistant Defender
1200 Sixth Ave.
Third Floor, North Tower
Detroit, Michigan 48226
(313) 256-2814

Supreme Court, U.S.
FILED

JUN 21 1990

JOSEPH F. SPANIOL, JR.
CLERK

TABLE OF CONTENTS

INDEX OF AUTHORITIES	i
COUNTER STATEMENT OF QUESTIONS PRESENTED	ii
COUNTER STATEMENT OF FACTS.	1
ARGUMENTS:	
<u>REASONS FOR DENYING THE WRIT</u>	
I. THE MICHIGAN SUPREME COURT RELIED ON ADEQUATE AND INDEPENDENT STATE GROUNDS IN FINDING HYPNOTICALLY REFRESHED TESTIMONY INADMISSIBLE AT TRIAL, THE U.S. SUPREME COURT THEREFORE LACKS JURISDICTION.	3
CONCLUSION	6

CKG*CG4291.brP*06-21-90
Lee, Albert, III

INDEX OF AUTHORITIES

CASES

<u>Delaware v Fensterer</u> , 474 US 15; 106 S Ct 292; 88 L Ed 2d 15 (1985)	3, 4
<u>Fay v Noria</u> , 372 US 391 (1963)	4
<u>Fox Film Corp v Muller</u> , 296 US 207; 80 L Ed 158; 56 S Ct 183 (1935)	4
<u>Foye v United States</u> , 54 App DC 46; 293 F 1013 (1923) . .	3
<u>Herb v Pitcairn</u> , 324 US 117 (1945)	4
<u>Michigan v Long</u> , 463 US 1032; 77 L Ed 1201; 103 S Ct 3469 (1983)	5
<u>Murdock v City of Memphis</u> , 20 Wall 590; 28 USC §1257 . . .	4
<u>People v Davis</u> , 343 Mich 348; 72 NW2d 269 (1955)	3
<u>People v Gonzales</u> , 415 Mich 615; 329 NW2d 743 (1982); modified, 417 Mich 986; 336 NW2d 751 (1983)	2, 3
<u>People v Lee</u> , 434 Mich 59 (1989)	2, 3
<u>People v Nixon</u> , 421 Mich 79; 364 NW2d 593 (1984)	2, 3
<u>Rock v Arkansas</u> , 483 US 44; 107 S Ct 2704; 97 L Ed 2d 37 (1987)	4
<u>United States v Owens</u> , 484 US 554; 109 S Ct 838; 98 L Ed 2d 951 (1988)	3, 4

COUNTER STATEMENT OF QUESTIONS PRESENTED

- I. WHETHER THE MICHIGAN SUPREME COURT RELIED ON ADEQUATE AND INDEPENDENT STATE GROUNDS IN FINDING HYPNOTICALLY REFRESHED TESTIMONY INADMISSIBLE AT TRIAL, WHETHER THE U.S. SUPREME COURT THEREFORE LACKS JURISDICTION?

COUNTER STATEMENT OF FACTS

Respondent Albert Lee, III, was charged with the February 12, 1979, felony murder of Linda VanderVeen, and on November 9, 1979, he was convicted as charged by a jury in the Kent County Circuit Court. He received the mandatory life sentence.

At trial several witnesses testified in varying degrees of certainty to identify Defendant as the alleged perpetrator. Each of the witnesses had been subjected to hypnosis prior to making identifications of Respondent. Respondent moved to suppress the testimony of the hypnotized witnesses. There were no statements, either written or recorded, of the facts these people recalled prior to hypnosis. Respondent's expert, Dr. Orne, referred to this fact as the major problem in evaluating the various hypnotic sessions:

"Q. [By defense counsel] ... To my knowledge, there is no recorded statement regarding Mr. Hill and Mr. Vos prior to the February 12 hypnotic session with Mr. Mazur.

A. [By Dr. Orne] Yes, sir, that is what I was referring to. The absence thereof.

Q. What problem does that create, if any?

A. Well, I don't know what the recollection was before hypnosis. It's very difficult to be certain about what is caused by hypnosis - the changes caused by hypnosis if I don't have a base line, and I would like to know frankly, what they really remembered before hand because that could be much more accurate memory. I mean, for some reason people think you want to go ahead and hypnotize so you get at the truth. You must look at the memory before hand because often that is better evidence, not worse evidence, and we just don't have that. So from the point of view of assessing what hypnosis does and from the point of view assessing

memory, this is a crucial set of data.
(Emphasis added).

* * *

A. After the event of the crime, I believe that hypnosis is a useful tool. I do not believe it should be used as the first thing. I think you ought to exhaust with some care the recollection of the individual without hypnosis and, in offense, all I have is a very short police report, and then this very long session with Mr. Mazur shortly thereafter. One of the things which I point out as an absolute necessity is before you start hypnotizing anybody, you want to establish a base line as to what they remember in some depth because how can I see what is being done by hypnosis to help memory or confuse, or whatever, if I don't know beforehand what you remember in detail? One of the safeguards which I propose is that before you start hypnotizing anybody, you sit down and, on video tape, get a detailed narrative story with asking whatever questions you want to spell out what the individual knows, because that is necessary to say, "Okay, he knows more now. He does know more", or there is some kind of influence, and if for no other reasons that you would like to know what he knew before he started so that in case hypnosis altered memory, you know what his prehypnotic memory was, and that is lacking, I simply don't have adequate data on that. (T 1583-1584)." (Emphasis added).

Following affirmance by the Court of Appeals, the Michigan Supreme Court reversed Respondent's conviction because the rules of People v Gonzales, infra, and People v Nixon, infra, were violated and it was error for the trial court to admit the identification testimony of the hypnotized witnesses. 434 Mich 59 (1989).

REASONS FOR DENYING THE WRIT

I. THE MICHIGAN SUPREME COURT RELIED ON ADEQUATE AND INDEPENDENT STATE GROUNDS IN FINDING HYPNOTICALLY REFRESHED TESTIMONY INADMISSIBLE AT TRIAL, THE U.S. SUPREME COURT THEREFORE LACKS JURISDICTION.

Response to Petitioner's request for review will be brief, simply because the instant case was decided on adequate and independent state grounds and this Court is therefore without jurisdiction. The Michigan Supreme Court held that the state evidentiary rules as set forth in two prior state Supreme Court decisions¹ were violated. People v Lee, 434 Mich 59, 63 (1989). The cases explicitly relied upon, Gonzales and Nixon, in turn were decided upon the limitation on admissibility of scientific evidence to techniques which have gained general acceptance, the Frye-Davis rule.² Each state must consider the question and many have applied their own state evidentiary rules, with various results.

Nowhere in either Gonzales, Nixon, or Lee does the Supreme Court mention or in any way rely upon the United States Constitution, any United States Supreme Court decisions, or any federal laws or statutes. Lee did not address Petitioner's arguments based on Delaware v Fensterer, 474 US 15; 106 S Ct 292; 88 L Ed 2d 15 (1985); United States v Owens, 484 US 554; 109 S Ct

¹ People v Gonzales, 415 Mich 615; 329 NW2d 743 (1982), modified 417 Mich 986; 336 NW2d 751 (1983), and People v Nixon, 421 Mich 79; 364 NW2d 593 (1984).

² People v Davis, 343 Mich 348; 72 NW2d 269 (1955), Foye v United States, 54 App DC 46; 293 F 1013 (1923).

838; 98 L Ed 2d 951 (1988), or Rock v Arkansas, 483 US 44; 107 S Ct 2704; 97 L Ed 2d 37 (1987). Moreover, neither Fensterer nor Owens involved hypnosis or any other scientific procedures.³ Rock, unlike the case at bar, involves the Defendant's right to testify. Petitioner's attempt to convert a case decided strictly on state evidentiary law into a federal constitutional confrontation case must fail.

This Court does not have jurisdiction where the decision below is based on adequate and independent state grounds. Justice Jackson, in Herb v Pitcairn, 324 US 117 (1945) stated, "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." See Murdock v City of Memphis, 20 Wall 590 (1875); 28 USC § 1257. This principle was re-affirmed in Fay v Noria, 372 US 391 (1963).

Even where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal, jurisdiction fails if the non-federal ground is independent and adequate. Fox Film Corp v Muller, 296 US 207, 210; 80 L Ed 158; 56 S Ct 183 (1935).

The Michigan Court in the instant case relied solely on state grounds, and did not use federal constitutional considerations to construe its own law. Therefore, jurisdiction with this Court does

³ The witnesses' testimony was not, as here, scientifically altered.

not lie. Michigan v Long, 463 US 1032; 77 L Ed 1201; 103 S Ct 3469
(1983). The People's Petition must be denied.

CONCLUSION

For these reasons, Respondent respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY:



Chari K. Grove (P 25812)
Assistant Defender
Third Floor, North Tower
1200 Sixth Street
Detroit, Michigan 48226
(313) 256-2814

Dated: June 21, 1990

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

THE STATE OF MICHIGAN

Petitioner,

-vs-

ALBERT LEE, III

Respondent.

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

VIRGINIA M. MELOSKY, being first-sworn, says that on June 21, 1990, she filed with this Court the following:

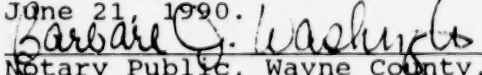
ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MICHIGAN
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AFFIDAVIT
RESPONDENTS BRIEF IN OPPOSITION
PROOF OF SERVICE

and she mailed one copy of same to:

Kent County Prosecutor
416 Hall of Justice, 333 Monroe Ave., NE
Grand Rapids, MI 49503
and
Attorney General
Law Building, 525 W. Ottawa
Lansing, Michigan 48913


VIRGINIA M. MELOSKY

Subscribed and sworn to before me
June 21, 1990.


Notary Public, Wayne County, Michigan

My commission expires: 5-31-92
IDEN NO. 4291 Chari K. Grove cg4291.pet